

Appl. No. 100644,604
Response filed February 27, 2006
Replied Office Action of September 26, 2005

Remarks

Claims 1-119 are currently pending in the application.

Restriction has been required under 35 U.S.C. § 121 to one of the following groups:

Group I, claims 1-26 and 56-119, drawn to a textured whey protein product, allegedly classified in class 426, subclass 583; or

Group II, claims 27-55, drawn to a method of preparing a textured whey protein product, allegedly classified in class 435, subclass 583.

For the purpose of providing a complete response to the present Office Action, Applicants elect Group I, claims 1-26 and 56-119. Applicants respectfully traverse the restriction requirement for the reasons set out below.

A species election requirement has also been imposed. Applicants elect species 1a, namely, a textured whey protein with wheat protein. All claims readable on this elected species are claims 1-26 and 56-119.

Under MPEP § 803 there are two criteria that must both be met before a restriction requirement is proper: (1) The inventions must be independent or distinct as claimed, and (2) there must be a serious burden on the examiner if restriction is not required.

The initial burden is on the examiner to provide reasons with respect to both of these requirements. MPEP § 803.

The Office Action alleged that Group I and Group II are distinct. The various types of distinct inventions must fit within one of the categories described in MPEP §§ 806.05(a)-(I). In this case, the Office Action alleged that the groups are distinct under MPEP § 806.05(f) when either or both of the following can be shown: (1) that the process as claimed can be used to make another and materially different product, or (2) that the product as claimed can be made by another and materially different process. The Office Action alleged that the product may be made by a process of treating a mixture of proteins in a static mold and then drying the resulting molded mixture.

Applicants respectfully submit that the proposed product would not be the same as the instantly claimed product. Thermoplastic extrusion of the protein/polysaccharide mixture results in a product that is at least significantly different in texture and density than a product produced in a static mold. Therefore, Applicants respectfully submit that the Office Action failed to give reasons that adequately support the alleged distinctness of the claimed product and process.

Assuming, *arguendo*, that a sufficient showing of distinctness had been made, the Examiner, to establish reasons for insisting on

restriction, must show by appropriate explanation one of the following: (a) separate classification, (b) separate status in the art, or (c) a different field of search. MPEP § 808.02. "Where, however, the classification is the same and the field of search is the same and there is no clear indication of separate future classification and field of search, no reasons exist for dividing among related inventions." MPEP § 808.02. For purposes of the initial requirement, a serious burden on the examiner may be *prima facie* shown if the examiner shows by appropriate explanation separate classification, separate status in the art, or a different field of search as defined in MPEP § 808.02. MPEP § 803. However, "[i]f the search and examination of an entire application can be made without serious burden, the examiner must examine it on the merits, even though it includes claims to distinct or independent inventions." MPEP § 803.

In this case, the Office Action alleged that Groups I and II are classified the same. The Office Action did not allege that the two groups of claims have achieved separate status in the art. Further, the Office Action did not allege that the search of the two groups will require a different field of search, only that different search strategies will be required. Further, there is no clear indication of separate future classification and field of

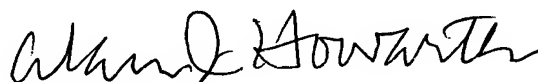
search. Thus, Applicants respectfully submit that no *prima facie* case of serious burden on the Examiner has been shown.

Moreover, Applicants respectfully submit that there would be no serious burden on the Examiner to examine the present application, regardless of whether or not a *prima facie* case of serious burden had been shown.

Since the Office Action did not make a sufficient showing of either distinctness or serious burden on the Examiner, Applicants therefore respectfully request that the restriction requirement be withdrawn and the application be examined as a unitary invention.

DATED this 27th day of February, 2006.

Respectfully submitted,



Alan J. Howarth, Ph.D.
Attorney Registration No. 36,553
Customer No. 020450

Clayton, Howarth & Cannon, P.C.
P.O. Box 1909
Sandy, UT 84091
Telephone: (801) 255-5335
Facsimile: (801) 255-5338